Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW, Petitioner

vs.

ANESTHESIA PARTNERS, INC.,
ANESTHESIA PARTNERS OF MONTANA, and
SAINT VINCENT HOSPITAL &
HEALTH CENTER, INC., Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the elements of a *per se* tying case include that the seller of the tying product must have an economic interest in the tied product? (There is a conflict among the Circuits regarding this issue.)

2. Does a foreclosed competitor's lack of injury arising from increased prices to consumers (which deprives the foreclosed competitor of standing to assert a price-fixing claim) translate into a lack of anti-trust injury regarding the foreclosed competitor's § 2 and state unlawful restraint of trade claims?

3. Does a competitor foreclosed from participating in the market due to his unwillingness to engage in price-fixing activity lack standing to assert a price-fixing claim where the foreclosed competitor's participation in the market would result in lower prices for consumers? (There appears to a be a conflict among the Circuits regarding this issue.)

4. Have the lower courts violated the standard of review by granting summary judgment, where a companion case pending in Montana state courts on the virtually identical record remains on track for jury trial in 60 days?

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OPINIONS BELOW

1. Judgment, United States Court of Appeals for the Ninth Circuit, Case No. 95-35241, entered August 5, 1996, (A-1).

2. Memorandum, United States Court of Appeals for the Ninth Circuit, entered August 5, 1996, (A-2). This decision was not reported.

3. Judgment in a Civil Case, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995, (A-18).

4. Memorandum & Order, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995, (A-19). This decision was not reported.

JURISDICTION

The judgment of the district court (A-18), as well as the Memorandum and Order on which it is based (A-19), were entered on February 23, 1995, and Notice of Appeal was timely filed on March 10, 1995.

The judgment of the Court of Appeals for the Ninth Circuit (A-21), and the Memorandum on which it is based (A-22), were entered on August 5, 1996. No petition for rehearing was filed.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Montana Sherman Act, § 30-14-205, MCA, are involved in this case. (A-32-33).

STATEMENT OF THE CASE

Plaintiff David G. Healow, M.D., ("Healow") filed this action as a state court proceeding before the Thirteenth Judicial District Court for Yellowstone County, Montana, alleging breach of contract, tortious interference, bad faith and various state and federal anti-trust theories against defendants Saint Vincent Hospital & Health Center ("St.V's"), Anesthesia Partners of Montana, P.C. ("APM") and Anesthesia Partners, Inc. ("API"). St.V's removed the matter to the Federal District Court for Montana because the case involves a civil action arising under an Act of Congress protecting trade and commerce against restraints and monopolies. 28 U.S.C. § 1337. Following submission of cross-motions for summary judgment, the District Court entered a Memorandum and Order which found a single breach of the St.V's Medical Staff Bylaws contract on the part of St.V's, but determined damages were not an available remedy, and which further found that the defendants were entitled to summary judgment as to all remaining counts of Healow's Amended Complaint. The District Court granted judgment accordingly. Healow filed a timely appeal to the Court of Appeals for the Ninth Circuit from the summary judgment in favor of the defendants. The Circuit Court on August 5, 1996, entered its judgment affirming the District Court.

Healow is a board certified anesthesiologist, who trained at Mayo Clinic; and is a member of St.V's active medical staff. Healow's clinical privileges at St.V's include without restriction the right to provide the

entire spectrum of anesthesia services and procedures. From 1984 until 1992 Healow provided surgical anesthesia and obstetrical anesthesia for patients at St.V's as a member of its "open staff" Anesthesia Department. Healow served a term as chairman of the St.V's Anesthesia Department. St.V's Medical Affairs Vice President considered Healow a "trusted consultant for both medical problems and in medical staff affairs", observed that Healow "has provided a true leadership role" to the Medical Staff Committee on Physician Health, and characterized Healow "as a valuable resource to the community." The Medical Affairs VP considered Healow an anesthesiologist St.V's wanted to keep.

On September 1, 1992, St.V's and APM first implemented an exclusive anesthesia services contract, and barred Healow from his anesthesia practice at St.V's in competition with APM. Healow had been offered an opportunity to participate in the APM contract. He declined that "opportunity". Healow's reasons for refusing included that he believed, presciently, that the institution the APM contract would "result in an immediate and substantial increase in the cost of anesthesia services to my patients", that the contract was contrary to the Medical Staff Bylaws, and that he was unwilling to participate in violations of federal or state antitrust laws.

Local obstetricians and patients view the geographic market for obstetrical anesthesia as Billings, with APM's market share being 100%. Healow's expert economist used a more expansive geographic market,

including an Indian Health Service hospital and two small rural hospitals, all at least 40 miles from Billings. APM controls a market share of 83.57% of that enlarged geographic market. Healow now has a 0% share of the market for obstetrical anesthesia services. Before the APM exclusive contract took effect the Herfindahl-Hirschman Index ("HHI") for the obstetrical anesthesia services submarket in the Billings geographic market was 2418. After the APM exclusive took effect the resulting HHI was 7168–an increase of a whopping 4750 points.

Healow has a particular interest in obstetric anesthesia. One local obstetrician in protesting Healow's exclusion stated Healow had "almost single-handedly at times kept obstetrical anesthesia going when there were a lot of problems". At least five local obstetricians desired Healow's services for their patients after Healow was excluded. Two of them had intended to use Healow exclusively when available. Healow was available for OB anesthesia at all times, even when not on call. St.V's Manager of Labor and Delivery testified: "Certainly Dr. Healow was one who enjoyed OB anesthesia, it was very obvious. He was very good."

There are only three facilities in the Billings geographic market for the delivery of surgical anesthesia services–only two with inpatient availability. APM controls all anesthesia delivered at the facility with the largest number of cases, 52.76 percent. Healow's share of the surgical anesthesia services market was approximately 4% until September 1, 1992, when as a

result of his exclusion from competition at St.V's his market share plunged to essentially 0%. Before the APM exclusive contract took effect, the HHI for the surgical anesthesia services market in the Billings geographic market was 812. After APM's exclusive took effect the resulting HHI was 2359–a 1547 point increase.

The prices charged by Billings anesthesiologists two months before the APM contract went into effect ranged from $35.00 to $45.00/unit, with the majority being under $40.00/unit. The average rate for APM contractors before the APM contract went into effect had been $38.74/unit. Healow's billing rate for surgical anesthesia services was then and still is $35.00/unit. While it remained unclear whether St.V's and APM intended to exclude him from his obstetrical practice, Healow attempted to start a price war, rolling back his prices for obstetrical anesthesia to $20/unit.

All bills issued to patients by APM have had a uniform fixed price, which was $42.00/unit from September through December 1992 and $45.00/unit since January 1993. The $42.00/unit price APM implemented at St.V's on September 1, 1992 was $3.00/unit higher than the highest price previously charged by any APM contractor. APM's contractors have the discretion to work elsewhere than at St.V's, setting their own prices on such occasions. None of those doctors, including the sole shareholder of APM, charge unit rates for anesthesia delivered at other locations as high as APM's uniform fixed unit rate for anesthesia delivered at St.V's.

St.V's current Medical Affairs VP is not able to identify "any quality improvements which would actually be considered to be of benefit to the patient on his back in the operating room" resulting from APM's exclusive contract. Despite receiving no quality of care benefits, patients have paid handsomely to fund APM's presence at St.V's. Through seven months of 1994, APM averaged more than $342,000.00/mo. in receipts. After adjustment for Medicare and similar restricted-pay patients, APM's receipts from patients billed at its fixed prices average over $225,000.00/mo. The same receipts, if billed instead at the $38.74/unit average rate which prevailed before the APM, would be less than $195,000.00/mo.; and would be only about $175,000.00/mo. if billed at Healow's $35.00 per unit rate. On an annual basis, APM's price-fixing scheme costs patients more than $360,000.00 per year above the average pre-APM billing rate and more than $600,000.00 per year above Healow's rate. On an individual patient basis, Laura Anderson's bill from APM for a 42-minute surgical procedure was $315.00. The same bill at average pre-APM rates would have been $271.00, and at Healow's rate would have been only $245.00. Laura Anderson was unlawfully forced not to use her anesthesiologist of choice, and charged a premium of $70 (almost 30%) for the privilege of being denied her prerogative to select her own medical providers.

The contract between St.V's and APM requires that physicians supplied by APM shall be independent contractors. It requires that APM compel its contractors to waive their staff rights. The contracts between APM

and the individual anesthetists establish that no anesthetist is a partner, agent, employee or joint venturer of APM, and that there is no partnership, joint venture, or equity interest between APM and the anesthetists. Those contracts also require waiver of medical staff rights. No governmental agency has determined that the individual APM anesthetists hold any status other than independent contractors. There have been 15 different entities which are independent contractors providing anesthesia services to patients at St.V's. There is no business relationship between the various entities which are contractors with APM.

The owner of APM's billing service testified it would have been possible for the separate APM contractors to continue using their own pricing-discretion and billing services. He argued to APM that APM's contractors should be allowed to do that. Prior to September 1992, the separate St.V's anesthesia providers did not share billing information with one another. Nor did their billing services exchange pricing information. Nor did billing services disclose the billing practices of any provider to any other provider using the same billing service.

In September 1992, the independent contractors were not consulted as to what rates they would charge their patients. API set the charge at $42.00 and the contractors ratified the rate. When unit charges were raised to $45.00/unit, API personnel recommended the increase and that increase was agreed to in advance by all the independent contractors. The price-fixing agreement has resulted in a statistically significant

increase in prices. By mid-1993, APM's rates remained almost 13% higher than the average price charged by the other anesthesiologists in the geographic market.

The number of patient complaints received at APM's office regarding anesthesia services has increased since APM's exclusive contract took effect, with the increase directly attributable to the increase in the price of anesthesia services. There has been no change, either up or down, in the numbers of complaints regarding factors other than price. There has been an increased delay in the delivery of refunds to patients since APM's exclusive contract became effective.

In late 1991, St.V's initiated an *ad hoc* review of its Anesthesia Department. At that time, as at all times, St.V's was not aware of any person who felt there was a significant existing quality problem with any of the individual anesthesia practitioners. The 1991 annual report from St.V's administration to the Medical Staff, presented December 4, 1991, (one day after the first *ad hoc* committee meeting) discusses results of a medical staff survey, showing that anesthesiology services graded virtually identically to hospital administration (3.27 vs. 3.28).

A number of St.V's Medical Staff Members responded to the *ad hoc* committee's solicitation of comments. None of the responses favored a closed anesthesia department. Many of the responses specifically objected to a closed department. Comments from Medical Staff members included the following excerpts found in the appendix at A-34-38.

The *ad hoc* committee expressly found: "There is no perception that we have significant existing quality problems." Despite that finding and the unanimous input from the Medical Staff advocating retention of an open staff, the *ad hoc* committee recommended the Anesthesia Department be closed, which St.V's board resolved to do.

Healow was one of four anesthesiologists based at St.V's in 1992 who did not become APM contractors. Two others left Billings. The fourth doctor, Robert Hylton, filed a state law contract and antitrust case which now is calendared for trial starting January 3, 1997. Dr. Hylton's state law claims are virtually identical to Healow's. The fact and expert evidence on liability issues is precisely identical.

ARGUMENT

1. Do the elements of a *per se* tying case include that the seller of the tying product must have an economic interest in the tied product? (There is a conflict among the Circuits regarding this issue.)

The leading tying case from this Court involving doctors foreclosed from practicing at hospitals is *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). Dr. Hyde was an anesthesiologist who was not permitted to join the medical staff of East Jefferson Hospital, which had had an exclusive anesthesiology contract since it opened. Three facts distinguish this case from *Hyde*. The two

distinguishing facts which contributed to Dr. Hyde's loss before this Court mitigate in Healow's favor here, as discussed below. The third differing fact is that in *Hyde*, Jefferson Hospital split the receipts for anesthesia services 50/50 with Dr. Roux, while in this case St.V's receives only $5000/month of the anesthesia receipts collected by its staff anesthesiologists, which St.V's uses to satisfy in part its monthly debt to APM. The Circuit Court held that the hospital has no economic interest in the sale of anesthesia services, which it held was fatal to Healow's tying claim.

This Court has never held that the elements of a tying claim include a requirement that the seller of the tying product must have an economic interest in the tied product. This Court in *Hyde* discussed only three elements: (1) two separate products with purchase of one (tied product) being conditioned on the purchase of the other (tying product); (2) sufficient economic power with respect to the tying product to restrain competition appreciably in the tied product; and (3) an effect upon a substantial amount of commerce in the tied product. Healow has established all three of these elements. Several Circuit Courts to varying degrees have identified an additional "economic interest" element, and at least one Circuit has expressly rejected such an element.

The Ninth Circuit Court discusses the economic interest element in *Robert's Waikiki U-Drive v. Budget Rent-a-Car Systems, Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984), which states:

> [T]he seller of the tying product must have an economic interest in the tied product for there to be per se illegality.

Later on the same page, the Court tempered the extent of the economic interest element...

> [T]he tying product seller's interest need not be so direct however, as long as the seller has an economic interest in the sale of the tied product.

The Second Circuit Court has rejected the economic interest element in *Gonzalez v. St. Margaret's Housing Dev. Fund*, 880 F.2d 1514 (2nd Cir. 1989). St. Margaret's was a low-income housing project which included a mandatory meal program, relaying payments from residents to an outside contractor which charged St. Margaret's more than the residents paid. The Second Circuit also held that these facts would be sufficient to satisfy the economic interest element anyway, 880 F.2d at 1517:

> It is not clear that the district court was correct in ruling that St. Margaret's has no 'economic interest' in the tied product.

The Eleventh Circuit discusses the economic interest element in *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1579 (11th Cir. 1991). There the Circuit Court held the test is very limited:

> [A] tying claim fails when the 'company has absolutely no interest in the sales of a third company whose products are favored by the tie-in.'

The Eleventh Circuit Court had first recognized that it had applied the economic interest element only three times, all franchise cases, and that "the need for this rule appears to be best suited to such cases...". The Court declined to limit the element to franchise cases though because the economic interest test was satisfied when Metropolitan Multi-List, which was wholly owned by the DeKalb Board of Realtors, required persons wishing to use its services to join the Atlanta Board of Realtors, which had common membership with DeKalb in the state and national Realtor organizations.

Robert's, *Gonzalez* and *Thompson* all involved economic interests far more tenuous than St.V's economic interest here; and in the latter two cases the Circuit Courts determined that there was nevertheless sufficient economic interest to satisfy the test. The St.V's/APM contract includes a mechanism by which APM's contractors may be compelled to satisfy St.V's monthly obligation to APM. St.V's has implemented that provision, benefitting $5,000.00/mo. from anesthesia services receipts applied against St.V's monthly debt. That $60,000.00 annual benefit to St.V's certainly constitutes an economic interest in the sale of anesthesia services, if there really is an economic interest element.

The other two facts distinguishing this case from *Hyde* militate in Healow's favor here. First, Healow was an incumbent member of St.V's staff when locked out, while Hyde was an applicant seeking to join the staff. Healow was not a participant in the market for hospital staff positions–he already had one. Healow, unlike Dr. Hyde, already was an active participant in the market of selling anesthesia services to patients. Second, and most significantly, East Jefferson Hospital was one of at least 20 hospitals in the geographic market. At least 70% of the patients living in Jefferson Parish used hospitals other than East Jefferson. This yielded a conclusion in *Hyde* that the hospital held no market power, therefore was unable to force consumers to buy an unwanted product. It necessarily followed that no illegal tying arrangement existed. St.V's is one of only two hospitals in the Billings market offering inpatient services for surgical patients, and the only participant in the Billings obstetrical hospital services market. St.V's has a clear monopoly in obstetrics, and is part of a duopoly in surgical services. The HHI indexes calculated before and after the APM exclusive became effective create a statistical presumption that forcing of anesthesia services is now a fact of life at St.V's. The market characteristics are far different here than in *Hyde*, with exactly the opposite conclusion indicated–market power exists, forcing is ongoing, and the tying arrangement is *per se* invalid.

This Court should grant certiorari in order to eliminate the conflict between the Circuits. If the Court determines the economic interest element does exist, the

Circuit Court erred in its determination that there are no genuine issues of fact that element is not satisfied here.

2. Does a foreclosed competitor's lack of injury arising from increased prices to consumers (which deprives the foreclosed competitor of standing to assert a price-fixing claim) translate into a lack of anti-trust injury regarding the foreclosed competitor's § 2 and state unlawful restraint of trade claims?

The Circuit Court Memorandum devotes only one brief paragraph to Healow's §2 and Montana state law unfair trade practice claims. A-15. The Circuit Court rejected those claims on the basis of its earlier finding that Healow had failed to show antitrust injury to justify his standing as a price fixing plaintiff. In reaching this conclusion the Circuit Court overlooked several important factors. First, the Circuit overlooked that while Healow may have lacked price fixing standing, he just as clearly did have tying standing. See, *Hyde*, fn 1, 466 U.S. at 4, 104 S.Ct. at 1554. The Circuit Court also overlooked that the defendants have foreclosed competition in a market which previously was competitive, that there exists a clear statistical presumption that consumers are being forced to buy anesthesia services from unwanted providers, and that the price of anesthesia services in the market has increased since the APM contract took effect. Power to foreclose competition and to raise prices often has been recognized by this Court and other courts as the hallmark of monopoly power.

The Circuit Court has failed to follow the directive which this Court set forth in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483, 102 S.Ct. 2540, 2550, 73 L.Ed.2d 149 (1982), where patients wishing Blue Cross reimbursement were forced to use psychiatrists rather than the psychologists of their choosing. Regarding that scenario, this Court stated:

> [T]he antitrust injury would have been borne in the first instance by the competitors of the conspirators, and inevitably–though indirectly–by the customers of the competitors in the form of suppressed competition in the psychotherapy market.

Here, applying the *McCready* logic, when Healow was foreclosed from competing at St.V's and his prospective patients forced to buy anesthesia services from APM contractors, the antitrust injury was borne first by Healow, and indirectly by his customers in the form of suppressed competition.

Assoc. Gen. Contractors of Cal. v. Cal. St. Council, 459 U.S. 519, 536-39, 103 S.Ct. 897, 908-909, 74 L.Ed.2d 723 (1983), recognizes that consumers and competitors in the market in which trade was restrained are favored plaintiffs, and states it is "virtually impossible to announce a black-letter rule that will dictate the result in every case."

Relying on *Assoc. Gen. Contractors*, the First Circuit Court stated in *SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 44-45 (1st Cir. 1995)

that: "[T]he presumptively 'proper' plaintiff is a customer who obtains services in the threatened market or a competitor who hopes to serve that market." The case also characterizes competitors as "favored plaintiffs in antitrust cases". 48 F.3d at 45.

Also relying on *Assoc. Gen. Contractors*, as well as *Todorov v. DCH Health Care Authority*, 921 F.2d 1438 (11th Cir. 1991), the Eleventh Circuit Court in *Thompson* engaged in a detailed discussion of the two plaintiffs' standing to assert their various antitrust theories. 934 F.2d at 1571-1572. That Circuit recognized that standing requirements may well vary for the different species of antitrust theories. The Circuit Court below failed to make that distinction in this case. Healow may not have had to pay the conspiracy's supracompetitive prices, but he was forced out of his status as a participant in the market as the defendants formed and implemented their cartel for the delivery of anesthesia services. If Healow lacks price fixing standing, it does not necessarily follow that he also lacks standing for all his other antitrust theories. Healow has §2 and state law standing.

3. Does a competitor foreclosed from participating in the market due to his unwillingness to engage in price-fixing activity lack standing to assert a price-fixing claim where the foreclosed competitor's participation in the market would result in lower prices for consumers? (There appears to a be a conflict among the Circuits regarding this issue.)

Healow refused to participate in the APM contract in part because he believed it would violate the antitrust laws, it required him to surrender his pricing discretion to APM, and he predicted the price fixing would result in unacceptable increases in price to his patients. He was excluded from his practice because he would not price fix. Plaintiff's expert economist opined that all effective price-fixing arrangements must include an enforcement mechanism. Although as a competitor Healow never was forced to pay the supracompetitive fixed prices, Healow was a victim of the enforcement mechanism of APM's price fixing scheme to the extent that he lost his entire surgical and obstetrical anesthesia practice. Nevertheless, the Circuit Court, relying on *Matsushita Elec. Indust. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986), rejected Healow's price fixing claims on standing grounds.

At least one Circuit Court has recognized that under some circumstances a foreclosed competitor doctor may have standing to assert a price fixing claim. In *Todorov*, the physician was found not to have standing, because he wanted in on the price fixing conspiracy. However, applying the facts which exist here to the legal discussion in *Todorov*, Healow should have standing on his price fixing claim. *Todorov* states, 921 F.2d at 1454:

> The anti-trust laws were not enacted to permit one person to profit from the anti-competitive behavior of another person. * * * The ability of a competitor to benefit

> from anti-competitive conduct is not the type of market distortion that the anti-trust laws were promulgated to correct.

The court then continued though that:

> [I]t is possible that Dr. Todorov's presence in the market would spur competition, resulting in lower prices. ... It is also possible that even if Dr. Todorov were driven from this market, entry barriers, which previously had restricted the supply of radiologists, would have been removed, opening the way for free and unrestrained competition.
>
> These arguments, however, have not been put forth by Dr. Todorov; his motive for seeking privileges to provide CT Scan services is not so altruistic. Dr. Todorov is simply looking to increase his profits, like any competitor.

Healow does put forth those legal arguments. And, factually, the situation exactly opposite from *Todorov* exists here. Healow was presented with the opportunity to become a member of the price-fixing cartel, and refused–which resulted in his exclusion from the market. While APM raised the rates of all its co-conspirators first to $42.00, then to $45.00, Healow has held the line on his rates at $35.00. Further, in the obstetric anesthesia market, Healow sought (to no avail) to start

a price war, reducing his rates by $15.00 per unit, to $20.00. Thus, while Dr. Todorov was "no champion for the cause of consumers", Healow is exactly that. He was excluded from the market because he would not agree to fix prices or restrain trade. He therefore has standing to challenge the entire price fixing scheme.

The Court should grant certiorari to resolve the conflict among the Circuits regarding the price fixing standing of a competitor who is foreclosed from participating in the market because of his refusal to participate in an unlawful price fixing conspiracy.

4. Have the lower courts violated the standard of review by granting summary judgment, where a companion case pending in Montana state courts on the virtually identical record remains on track for jury trial in 60 days?

The action filed against the same defendants by excluded anesthesiologist Robert Hylton is the Montana state court counterpart to this case. On all state law liability issues, the facts regarding both cases are identical. *Hylton v. Anesthesia Partners, Inc., et al.*, Montana 13th Judicial District Court, Yellowstone County Cause No. DV-93-815, is scheduled for trial in two months, commencing January 3, 1997. To date, the Montana District Court has not granted summary judgment for the defense as to any portion of the case. The Circuit Court was supposed to be governed by the following standard of review, set forth in *Community*

Elec. Service v. National Elec. Contr., 869 F.2d 1235, 1246 (9th Cir. 1989):

> The anti-trust aspects of this case also affect our determination. We acknowledge the lenient evidentiary requirements for proving a conspiracy violating anti-trust laws. Federal courts grant wide latitude in concluding conspiracy or collusion from parallel conduct and the inferences drawn from the circumstances. ... We grant summary judgment less frequently in the anti-trust context, in part because the alleged conspirators control the proof.

To whatever extent the Montana District Court proceeds to trial of Dr. Hylton's case against these same defendants, there will have existed in the eyes of the state district court judge genuine issues of material fact as to those issues. To that same extent, the Circuit Court below will have violated its own lenient standard of review in affirming summary judgment against an identically situated plaintiff.

CONCLUSION

This case presents two issues where the circuits are in conflict. The Court should grant certiorari in order to resolve those conflicts. Further, the Court should grant certiorari in order to correct the err which the Circuit Court for the Ninth Circuit committed in overlooking that competitors are favored plaintiffs in antitrust cases, and failing to follow the clear direction from this Court found in *McCready* and other cases.

Finally, this Court should grant certiorari in order that the Circuit Court may consider the holdings of the Montana courts and jury in the *Hylton* case, and thereby assure that Montana state law is applied uniformly in all litigation involving the facts at issue.

Respectfully submitted.

JAMES P. HEALOW
Attorney for Petitioner

November 4, 1996

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3. Judgment in a Civil Case, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995 . . . . . A-18

4. Memorandum & Order, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995 . . . . . A-19

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JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-35241
CT/AG#: CV-92-00187-JDS

DAVID G. HEALOW

Plaintiff - Appellant

V.

ANESTHESIA PARTNERS,INC.;
ANESTHESIA PARTNERS
OF MONTANA; SAINT VINCENT
HOSPITAL & HEALTH CENTER

Defendants- Appellees

APPEAL FROM the United States District Court for the District of Montana (Billings).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 5, 1996.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-35241
DC# CV 92-187-BLG-JDS

DAVID G. HEALOW,

Plaintiff-Appellant,

v.

ANESTHESIA PARTNERS, INC.; ANESTHESIA PARTNERS OF MONTANA; AND SAINT VINCENT HOSPITAL & HEALTH CENTER, INC.,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding
Argued and Submitted March 5, 1996
Seattle, Washington
Before: FLETCHER, NOONAN, AND RYMER, Circuit Judges

PROCEEDINGS BELOW

David Healow, plaintiff-appellant, filed suit in state court in Montana alleging breach of contract, tortious interference of contract, breach of covenant of good faith and fair dealing and state and federal antitrust claims against St. Vincent Hospital and Health Center (St. Vincent or the Hospital), Anesthesia Partners of Montana, P.C. (Partners P.C.), and Anesthesia Partners, Inc. (Partners, Inc.). St. Vincent removed the case to the federal district court for Montana because the case involved a federal question.

Healow moved the district court for partial summary judgment, and St. Vincent, Partners P.C., and Partners, Inc, moved for summary judgment on all issues. The district court granted summary

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

judgment for the defendants on all issues. Healow appeals the district court's grant of summary judgment.

FACTS

St. Vincent is a private, non-profit hospital in Billings, Montana that permits physicians to practice on its premises. These doctors are usually referred to as the "medical staff." The Hospital is governed by a board of directors, while the medical staff is governed by a set of bylaws. The bylaws provide that they "shall, when adopted and approved, be equally binding on the Board of Directors and the Medical Staff"; both the medical staff and the Board approved the bylaws in 1990. David Healow is an anesthesiologist who is a member of St. Vincent's medical staff and who provided anesthesia services at the hospital from June 1984 through September 1992.

In the late 1980's the President of St. Vincent, James Paquette, became aware of problems with the management of the anesthesiology department. The Vice President of St. Vincent for Medical Affairs, Dr. McClave, sent Paquette a memo detailing problems in the department including conflicts over scheduling, the type of anesthesia to be delivered, coverage for obstetrical cases, and other organizational problems. Later that year, St. Vincent created an ad hoc committee to review the department. The committee contacted persons affected by the anesthesiology department, and McClave sent all members of the medical staff a memorandum stating that the ad hoc

committee was investigating the anesthesiology department's operations and policies. The memo stated that the purpose of the review was to

> review alternative methods of organization, functional roles for CRNA's [certified nurse anesthesiologists] and MD anesthesiologists, case scheduling, supervision, quality assurance and all related organizational issues. Among the options being considered will be the closure of the department by means of an exclusive contract with a particular provider or a group of providers to provide anesthesia services. The [ad hoc committee] will make a report to the Board of Directors regarding its findings and recommendations.
>
> The Board strongly encourages any interested members of the Medical Staff ... to submit written evidence, statements or with respect to [these] issues ... .

The ad hoc committee performed a survey of staff and interviewed many of them. It recommended that the Board of Directors establish a medical director of anesthesia who would have a contractual relationship with the Hospital and would subcontract with individual anesthesiologists to provide anesthesia services to the Hospital. Although many anesthesiologists had specifically objected to such a system, the Board resolved to close the anesthesia department and enter into an exclusive contract with an outside company to provide anesthesia services.

St. Vincent entered into a three-year exclusive contract with Partners P.C. for the provision of general surgical and obstetrical anesthesia. Partners, Inc. provides management services for a fee to Partners P.C. Under the agreement with the Hospital, Partners P.C. was to contract with anesthesiologists to provide service under the contract. Between June 30, 1992 and September 1, 1992, every anesthesiologist on St. Vincent's staff was offered the opportunity to apply to be an independent contractor under the agreement with the hospital, and every anesthesiologist who applied was accepted. The hospital encouraged Healow to apply, but he did not.

Under the contract between Partners P.C, and St. Vincent, St. Vincent pays Partners P.C. $240,000 a year for Partners P.C.'s management of the department. An expert for the defendants stated that in actuality, the hospital bears 75% of this cost, while the staff anesthesiologists bear 25%.

There are three operating room locations in Billings: St. Vincent, Deaconess, and Northern Rockies Surgicenter. St. Vincent handles about 53% of the cases involving anesthesia, Deaconess about 40%, and Northern Rockies Surgicenter about 7%. Partners P.C. provides 100% of the obstetrical anesthesia services in Billings and 83.6% of such services in Billings and connected counties. Healow contends that the average cost per unit of anesthesia has increased from $38.74 per unit of anesthesia before Partners P.C. took over to $45 per unit as of January 1993. Partners P.C. sets a uniform rate for

all anesthesia services that the anesthesiologists who are associated with Partners P.C.

STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment on all of Healow's causes of action de novo. Jones v.Union Pacific R.R., 968 F.2d 931, 940 (9th Cir. 1992).

ANALYSIS

I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS ON HEALOW'S BREACH OF CONTRACT CLAIMS

A. ST. VINCENT'S ALLEGED VIOLATION OF ITS BYLAWS REQUIRING EXECUTIVE COMMITTEE APPROVAL OF THE PLAN TO CREATE A CLOSED ANESTHESIA DEPARTMENT WAS NOT MATERIAL

Healow argues that St. Vincent violated its bylaws when the board of directors voted to close the anesthesiology department without guidance from the Executive Committee and that this violation should be actionable as a breach of contract. We need not decide whether the bylaws constitute an enforceable contract because even if they did the Hospital's violation was not material. The Bylaws provide at § 11.5-2(f) that the Executive Committee shall consider and recommend "action to the Board of Directors and

Administration of the Hospital on all medico-administrative matters." Although it is true that the Executive Committee did not perform such a function in deciding to close the anesthesiology department, the Ad Hoc committee did. The Ad Hoc committee solicited the opinions of the members of the anesthesiology department and of the medical staff as a whole and received a large number of responses. Although St. Vincent may have violated the precise terms of the bylaws, it has not done so materially. Thus, we find that the district court was correct to grant summary judgment for St. Vincent on this breach of contract claim.

B. ST. VINCENT DID NOT VIOLATE ITS BYLAWS REGARDING THE QUALIFICATIONS FOR DOCTORS BY REQUIRING HEALOW TO BECOME AFFILIATED WITH ANESTHESIA PARTNERS

The district court found that there was no material dispute of fact that St. Vincent did not violate its bylaw § 8.2-2, which lists education, training, experience, ability and judgment as the criteria for privileges to practice medicine at St. Vincent by closing its anesthesia department and requiring all anesthesiologists to become affiliated with Partners P.C. Healow has not raised a genuine issue of material fact as to whether St. Vincent added a new criterion for the privilege of practicing medicine; instead, every material fact points to the Hospital's having made a policy decision to close its anesthesia department and enter into an exclusive contract with

Partners P.C, for the provision of anesthesia services at the Hospital.

C. ST. VINCENT DID NOT VIOLATE ITS BYLAWS BY NOT GIVING HEALOW NOTICE AND A HEARING BEFORE NOT PERMITTING HIM TO PRACTICE WITH ST. VINCENT

Healow claims that St. Vincent violated bylaw Sections 15.1-1(a) (vii) and 15.1-3, which entitle a doctor to notice and a hearing if his privileges are restricted, reduced, suspended, or revoked. Healow claims that before St. Vincent closed its anesthesiology department he was entitled to notice and a hearing.

The district court correctly concluded that Healow was not entitled to notice and a hearing because these bylaws concern disciplinary action directed at an individual physician, not the closure of an entire department. Indeed, § 15.12(b) of the bylaws contains an exception to the notice and hearing requirement that makes clear that Healow was not entitled to a hearing before St. Vincent shut down the department:

> An action listed in Section 15.1-l(a) that is taken under Section 15.1-2(a) in response to a general policy of the Hospital ... shall not entitle the affected practitioner to the procedural rights provided under this Fair Hearing Plan unless the practitioner produces evidence to the satisfaction of the President of the Hospital that raises a

reasonable question as to whether the ... Hospital's policy was properly implemented ....

Here, the hospital made a general policy decision that was not directed at Dr. Healow individually. Thus, the district court was correct to find that St. Vincent did not violate this bylaw.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR ST. VINCENT ON THE GROUND THAT IT DID NOT BREACH THE COVENANT OF GOOD FAITH AND FAIR DEALING.

Healow does not develop well his claim that St, Vincent breached the covenant of good faith and fair dealing implied in its bylaws. His argument seems to be that the hospital breached the covenant of good faith and fair dealing when it closed the anesthesiology department when many anesthesiologists opposed it doing so.

The implied covenant of good faith and fair dealing is not a cause of action for tortious breach of contract. See Story v. City of Bozeman, 791 P.2d 761, 713-775 (Mont. 1990) (explaining the history of the covenant in Montana). Rather, it "imposes an obligation of good faith" in the performance or enforcement of a contract and is breached when a party acts arbitrarily, capriciously, or unreasonably in contravention of the justified expectation of the parties. Id. at 174-75. In light of the extensive consultation with the medical staff undertaken by the Board through the ad hoc

committee, Healow has not raised a genuine issue of material fact that would suggest that St. Vincent acted arbitrarily and capriciously.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR ST. VINCENT, PARTNERS P.C., AND PARTNERS, INC. ON HEALOW'S TORTIOUS INTERFERENCE CLAIM.

Healow claims that St. Vincent Partners P.C, and Partners, Inc. tortiously interfered with his business relations with surgeons and patients by closing the department down and not allowing him to practice at the hospital because he was not associated with Partners P.C. The district court dismissed, but did not specifically address, this claim on summary judgment. Reviewing this claim de novo, we find the district court correctly dismissed this cause.

In order to assert a prima facie claim of tortious interference with business relations, a plaintiff must show that a defendant "intentionally committed a wrongful act without justification or excuse." Richland Nat. Bank & Trust v. Swenson, 816 P.2d 1045, 1051 (Mont. 1991). A plaintiff must show the defendants acts were 1) intentional and willful; 2) calculated to cause damage to the plaintiff in his business; and 3) done with the unlawful purpose of causing damage or loss without justifiable cause on the defendant's part. Id. Healow has not met this burden.

Healow has not raised a genuine issue of material fact that the hospital acted unlawfully in closing the department. Furthermore, there is no genuine issue of material fact that the hospital closed the department with the intention of interfering with Healow's relations-with other surgeons or his patients. Rather, there is no dispute of material fact that the hospital had no such intention since it invited him (Healow does not dispute this fact) to sign up with Partners P.C, so that he might continue to work as an anesthesiologist at St. Vincent. Thus, Healow has failed to establish a prima facie case of tortious interference.

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR ST. VINCENT, PARTNERS P.C., AND PARTNERS, INC. ON HEALOW'S ANTITRUST CLAIMS.

Healow waived many of his antitrust claims by failing to address them in his brief to this court. His federal claims of price fixing and tying and his state antitrust claims remain. Summary judgment is appropriate when a plaintiff's antitrust theories are speculative, unreasonable, economically senseless, or do not make practical sense. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468-69 (1992).

Healow claims that St. Vincent, Partners P.C., and Partners, Inc. conspired to fix prices and created an illegal tying arrangement in the delivery of anesthesia services in violation of the Sherman Act

and Montana state law. Because Montana modeled its laws after the federal antitrust laws, the Supreme Court of Montana has stated that it gives "due weight" to federal interpretation of antitrust violations. Smith v. Video Lottery Consultants, Inc., 858 P.2d 11, 13 (Mont. 1993). Thus, we will evaluate Healow's state and federal antitrust claims under the applicable federal case law.

A. PRICE FIXING

A necessary requirement for any plaintiff bringing suit under the federal antitrust laws is a showing of antitrust injury–an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 417, 489 (1917). Even a plaintiff who challenges an action that is per se illegal like price fixing must show that the defendants' illegal conduct has caused him antitrust injury. Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988).

Healow argues that the injury to competition is that he is prevented from providing obstetrical anesthesia because St. Vincent is the only hospital in Billings where such services are provided. If this injury is in regard to his price fixing claim, Healow has failed to establish a proper antitrust injury. The antitrust laws are not concerned with injury to competitors, but with injury to competition. cf. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8 (1986) (competitors "may not complain of conspiracies

that ... set minimum prices at any level). That one anesthesiologist is prevented from practicing anesthesia is not an injury to competition unless Healow can show that it has had an anticompetitive effect. See Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) (antitrust plaintiffs "must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").

If Healow contends that the anticompetitive effect is the increase in price of anesthesia, Healow lacks standing to assert such a claim. Under ARCO, Healow must show that he is "adversely affected by an anticompetitive aspect of the defendant's conduct," Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339 (1990), that is, an increase in price. But Healow does not show that the defendants' efforts to fix prices above the competitive level have harmed him. Customers may be harmed by such a price increase, but as an anesthesiologist, Healow is not. In ARCO, the Supreme Court "decline[d] to dilute the antitrust injury requirement" to allow competitors to bring suit against a maximum price fixing scheme. Id.at 345. If a price fixing scheme produced anticompetitive effects, "consumers ... may bring suit," Id. The Court's reasoning in ARCO applies with equal force here. Healow has not shown why he is entitled to bring this action on the behalf of consumers. The district court was therefore correct to grant summary judgment on this price fixing claim.

Furthermore, Healow's price fixing allegations make little sense on the merits. Healow has not shown any economic motivation for St. Vincent to conspire with Partners P.C. to fix prices in anesthesia. Because St. Vincent does not own Partners P.C., receives no compensation for the delivery of anesthesia services by Partners P.C. at St. Vincent, any price increase by Partners P.C. would harm St. Vincent because it would raise the total cost of surgery at the hospital. A price increase would in turn decrease demand for surgery at St, Vincent without St. Vincent sharing in the profits gained from the increased price of anesthesia. Cf, **Phillip Areeda**, IX **Antitrust Law** § 1762d, at 337 (1991) .

If Healow's allegation that he is injured by not being able to practice anesthesiology in Billings boils down to a claim that St. Vincent and Partners P.C. attempted to monopolize the market for anesthesia, Healow has failed to state a valid attempted monopolization claim. As explained above, he has failed to demonstrate antitrust injury, which is a necessary element of an attempt to monopolize. See Pacific Express, Inc. v, United Airlines, Inc., 959 F.2d 814, 817 (9th Cir.) (holding that causal antitrust injury must be proven to establish attempted monopolization), cert. denied, 113 S. Ct. 814 (19921.

B. TYING CLAIM

The tying of the purchase of one product to the purchase of another violates the antitrust laws if 1) there is a tie between two distinct products or

services; 2) there is sufficient power in the tying market to impose significant restrictions in the tied market; 3) there is an effect on a not insubstantial volume of commerce in the tied product. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc, 732 P.2d 1403, 1407 (9th Cir. 1984). When a tied and tying product are owned by different parties, as is the case here, a plaintiff must prove a fourth element: that the supplier of the tying product has an "economic interest' in the tied product. Robert's, 732 F.2d at 1407. Healow has failed to do so here. St. Vincent gets no money from Partners P.C. if Partners P.C. provides anesthesia to patients at St. Vincent. Indeed, St. Vincent pays Partners P.C. an annual fee to compensate it for the administrative services it provides to St. Vincent. Because St. Vincent makes no money and receives no benefit from Partners P.C.'s provision of anesthesia at St. Vincent, St. Vincent has no economic interest in the provision of anesthesia by Partners P.C.

That St. Vincent is able to reduce its monthly payment of $20,000 to Partners P.C. to $15,000 by having $5000 paid by anesthesiologists does not give St. Vincent an economic interest in the provision of anesthetic services. This price reduction is not keyed to the increase or decrease in the output or price of anesthesia services; rather, St. Vincent requires the anesthesiologists to bear part of the administrative fee charged by Partners P.C. Whether or not Partners P.C. tries to exercise market power through a tying arrangement, St. Vincent can still require the anesthesiologists to bear part of this administrative

fee. The fact remains that if Partners P.C, used its alleged market power in anesthesia services to restrict output and raise prices in anesthesia, St. Vincent would be harmed because the overall price for surgical services would increase, in turn decreasing consumer demand for its services without it reaping any of the benefits of the price increase. Hence, the Hospital has no economic interest in the provision of anesthesia services by Partners P.C. Thus, the district court was correct to grant summary judgment on Healow's tying claim.

CONCLUSION

We AFFIRM the district court's grant of summary judgment in favor of St. Vincent, Anesthesia Partners of Montana P.C., and Anesthesia Partners, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CASE NUMBER: CV 92-187-BLG-JDS

DAVID G. HEALOW

Plaintiff,

V.

ANESTHESIA PARTNERS,INC.,
ANESTHESIA PARTNERS
OF MONTANA, and SAINT VINCENT
HOSPITAL AND HEALTH CENTER,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trail or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That plaintiff's motion for partial summary judgment is denied.

Anesthesia Partners, Inc.'s and Anesthesia Partners of Montana's Motion for Summary Judgment is granted.

Plaintiff's motions in limine are denied.

Date: February 23, 1995

LOU ALEKSICH, JR., Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 92-187-BLG-JDS

DAVID G. HEALOW,

Plaintiff,

vs.

ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA, and SAINT VINCENT HOSPITAL AND HEALTH CENTER, INC.,

Defendants.

MEMORANDUM & ORDER

Pending before the Court is a motion for partial summary judgment and motions in limine by plaintiff, Dr. David G. Healow (Dr. Healow). Also pending are motions for summary judgment by defendants, Anesthesia Partners, Inc. (AP Inc.), Anesthesia Partners of Montana (AP of Montana), and Saint Vincent Hospital and Health Center, Inc. (Saint Vincent).

As discussed below, the Court denies Dr. Healow's motion for partial summary judgment and motions in limine, and grants defendants' motions for summary judgment.

Background

James Paquette (Paquette) is the President and chief executive officer of Saint Vincent. In April, 1989, Paquette received a letter from nurse anesthetists which described the "increasing amount of discord and dissension in the Anesthesia department. April 26, 1989 letter from C.R.N.A, to Paquette, p.l.

On June 12, 1989, Paquette received a memorandum from Dr. McClave, Vice-President of Medical Affairs, which noted the increasing contention and unhappiness within the Anesthesia department and warned that unless resolved, the contentions would effect future care. The lengthy memorandum also described the scheduling and supervising difficulties within the Anesthesia department.

On July 17, 1991, a member of the Anesthesia department, Dr. Robert Hylton, wrote to Dr. McClave and described the break down of scheduling and management within the department. The letter described the quibbling between the department members and warned that before long the divisions within the group would create anarchy in the department.

Aware of the serious problems and acting on Paquette's recommendation, Saint Vincent Board of Directors formed an Ad Hoc Committee to conduct a formal investigation of the Anesthesia department. During its investigation, the Ad Hoc committee solicited responses from surgeons, nurses, obstetricians and the members of the Anesthesia department. One response came from plaintiff, Dr. Healow, who stated,

> There is, however, a level of unresolved animosity and mistrust which may be hindering movement toward a continuously improving department. Historically, the department carries a legacy of unresolved conflict, incivility, and variable quality related to historical shortage of providers, difficult personalities, and attempts at domination of the anesthesia market. For several years, there has been no delegated administrative authority for the control of anesthesia scheduling; with a relative shortage of anesthesia, a limited number of rooms could be opened and many anesthesia needs went unmet. However, with the increasing number of anesthesia providers, this lack of scheduling

> authority has created new difficulty without resolving many of the problems related to shortage.
>
> The needs of the hospital in the area of Obstetrical Anesthesia have been chronically neglected by our department. Horror stories can be told by any of the senior obstetricians relating the difficulties getting anesthesia coverage. Slow response, patient abuse, and refusal to cover even emergency c-section are recurrent themes. Coverage and care has improved markedly in the last 5 years, but gaps in coverage still occur ....
>
> There are other recurrently disruptive issues, such as the lack of an intradepartmental conflict resolution process, which hinder the department's progress.

Memorandum from Supervising Anesthesiologists [Dr. Healow] to Ad Hoc Committee. At the end of the memorandum, Dr. Healow expressed a willingness to "associate in whatever framework necessary to accomplish the goals developed in the Ad Hoc process." Id.

At the conclusion of the investigation, the Ad Hoc Committee recommended Saint Vincent establish a medical director of anesthesia, who would have a contractual relationship with Saint Vincent, and who would, in turn, subcontract with individual anesthesiologists for the performance of anesthesia services at Saint Vincent. On January 16, 1992, the Board of Directors adopted the Ad Hoc Committee's

recommendation. In adopting the recommendation, the Board cited thirteen anticipated benefits that a closed Anesthesia department would bring to the management and administration of the department. See, April 16, 1992, Resolution of the Saint Vincent Board of Directors, p.3,4.

On June 30, 1992, Saint Vincent and AP of Montana entered a contract whereby AP of Montana would be the exclusive provider of non-cardiovascular anesthesia services. In turn, AP of Montana recruited anesthesiologists to provide services under the contract. Between June 30, 1992 and September 1, 1992, all anesthesiologists practicing at Saint Vincent, including Dr. Healow, were offered the opportunity to apply to work under AP of Montana. Every anesthesiologist who applied was accepted by AP of Montana. Dr. Healow chose not to apply to work under AP of Montana.

On October 15, 1992, Dr. Healow filed suit alleging the following ten counts: Count I - Breach of Contract, Count II Breach of the Covenant of Good Faith and Fair Dealing, Count III Tortious Interference with Business Relationships, Count IV Monopoly, Count V - Price Fixing, Count VI - Tying, Count VII Limiting production, Count VIII - Violation of SS 30-14-205 Mont. Code Ann. (1993), Count IX - Unfair Competition, Unfair Trade Practices, and Count X - Federal Anti-trust.

The Court will now address the merits of the pending cross motions for partial summary judgment and summary judgment.

Count I • Breach of Contract

Dr. Healow claims Saint Vincent breached their contract when Saint Vincent violated provisions of the medical staff Bylaws. When analyzing and considering relief for a violation of medical staff bylaws, the Court follows the law set forth in Maxwell v. Sisters of Charity of Providence of Montana, 17 Mont.Fed.Rep. 94 (Mont. 1994), which states:

> If a hospital merely fails to follow the procedural requirements of its by-laws, the resultant inequity can be cured by a court order requiring the hospital to comply with its by-laws. It is only when the hospital's decision to terminate clinical privileges is arbitrary, capricious or discriminatory that monetary relief is justified.

Id. at 105. Dr. Healow claims Saint Vincent violated the following sections of the Bylaws.

A. Breach of Bylaws § 11.5-2(c),(d),(f), and (j).

The Bylaws § 11.5-2(c),(d),(f), and (j) set out the responsibilities of the executive Committee. These Bylaws require the Executive Committee to evaluate and make recommendations concerning hospital services, including anesthesia services. Bylaw § 11.5-

2(j)[1]. Dr. Healow argues Saint Vincent violated the Bylaws when it failed to have the Executive Committee evaluate the Ad Hoc Committee's recommendation to have a closed Anesthesia department. The Court finds that since the Executive Committee did not review the Ad Hoc Committee's recommendation, a breach of Bylaw § 11.5-2 (j) has occurred.

While Saint Vincent breached Bylaw § 11.5-2(j), Dr. Healow is not entitled to money damages because the breach was not done in an arbitrary, capricious, or discriminatory manner. See, Maxwell, 17 Mont. F.Rep, at 105. The only other remedy available for a breach of the Bylaws is for the Court to order Saint Vincent to fulfill its obligations under the Bylaws. Id. For the following reasons, however, the Court finds it is not appropriate to order the Executive Committee to review the Ad Hoc Committee's recommendation.

The Anesthesia department has been operating under the exclusive contract for over two years now.

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[1]Bylaw § 11.5-2 states,

[T]he Executive Committee shall have responsibility, without limitation, for:

(j) Evaluating the quality of ancillary services, including equipment, space, and operating policies and practices of all such services and making appropriate recommendations regarding such services to the President of the Hospital and the Board of directors. The services to be so evaluated shall include, without limitation, anesthesiology.... Preliminary evaluation may be delegated to a standing committee or medical director specifically concerned with the operation of the ancillary service. Such review by a standing committee shall be reported to the Executive Committee for its consideration and recommendations.

Before deciding to implement the exclusive contract, Saint Vincent conducted a lengthy and thorough review of the complex problems facing the department. During its investigation, Saint Vincent interviewed two outside consultants, the entire Anesthesia department, three members of the Operating Room Staff, nine members of the Surgical Staff, and four members of the Nurse Anesthesiologists. In addition to these interviews, Saint Vincent sent a letter to the entire medical staff soliciting written comment on issues regarding the Anesthesia department. Considering the lengths Saint Vincent went to investigate the issue, it would be futile for the Court to order more review.

Furthermore, the Executive Committee and Dr. Healow must share in the responsibility for the Executive Committee's failure to evaluate the Ad Hoc Committee's recommendation. At the time of the Ad Hoc Committee's recommendation, the record is silent as to anyone objecting to the procedure. The Executive Committee did not object to the procedure. Dr. Healow did not go before the Executive Committee seeking review. Dr. Healow did not go before Paquette and object to the procedure and hospital's policy as provided for in Bylaw § 15.1-2(b). No one called upon the Bylaws Committee to interpret disputes in the Bylaw procedures. See, Bylaw § 11.8-2(c).

In sum, while the Executive Committee should have reviewed the recommendation of the Ad Hoc

Committee, it is not appropriate to send this case back to the Executive Committee for review.

B. Breach of Bylaw § 8.2-2.

Bylaw § 8.2-2 lists education, training, experience, ability, and judgment as the criteria for privileges to practice medicine at Saint Vincent. Dr. Healow claims Saint Vincent breached Bylaw § 8.2-2 by adding a new criteria for privileges, namely the requirement that anesthesiologists be under a contract with AP of Montana.

Saint Vincent has not breached Bylaw § 8.2-2. By switching to a closed Anesthesia department, Saint Vincent has not added a new criteria § 8.2-2. Saint Vincent has made a general policy determination concerning the administration of business. In managing the hospital, Saint Vincent has the right to make general policy decisions.

C. Breach of Bylaw Article XV, notice and hearing.

According to the Bylaws, if Saint Vincent restricts, reduces, suspends, or revokes a doctor's privileges, the doctor is entitled to a notice and hearing. Bylaws §§ 15.1-l(a) (vii), 15.1-3. Dr. Healow agrees he was entitled to a notice and a hearing because Saint Vincent's decision to close the anesthesiologist department effectively revoked his hospital privileges.

Saint Vincent has not breached Bylaw Article XV. Dr. Healow is not entitled to a notice or a hearing because the decision to close the Anesthesia department was a "general policy" decision made by

Saint Vincent. See, Bylaw § 15.1-2(b). See, also, Engelstadt v. Virginia Municipal Hosp., 718 F.2d 262, 268 (8th Cir.1983).

Count II
Breach of the Covenant of
Good Faith and Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing. Story v. City of Bozeman, 191 P.2d 761, 175 (Mont. 1990). The conduct required by the covenant is "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Id., See also, § 28-1-211 Mont. Code Ann. (1993). Since Saint Vincent has acted honestly and observed reasonable commercial standards of fair dealing, the Saint Vincent has not breach the implied covenant of good faith and fair dealing.[2]

The record shows a chaotic Anesthesia department in need of an administrator. Saint Vincent adopted the closed Anesthesia department only after conducting a thorough investigation which included input from Dr. Healow. Dr. Healow himself recognized the department's needs and at one point expressed willingness to work in whatever framework Saint Vincent chose to meet the problems.

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[2] Since defendants have acted honestly and observed reasonable commercial standards, there is no need for the Court to analyze "special relationships, " tort, and contract versions of the implied covenant of good faith and fair dealing. See, Story, 791 P.2d at 775, 776.

Counts III through X • Antitrust

In Counts III through X, Dr. Healow claims damages under various antitrust theories. For the following reasons, the Court grants summary judgment in favor of defendants.

In each antitrust count, Dr Healow claims defendants caused him antitrust injuries. See, Amended Complaint, paragraphs 56, 63, 69, 75, 81, 87. Defendants have not caused Dr. Healow's antitrust injuries. Dr Healow caused his own injuries. Dr. Healow was offered and turned down the opportunity to practice anesthesiology at Saint Vincent. Since defendants did not cause Dr. Healow injuries, the antitrust claims must fail.

Another compelling reason to deny Dr. Healow's antitrust claims is the lack of conspiratorial actions aimed at restraining trade or destroying competition. The record is clear. Saint Vincent's motivation to use an exclusive anesthesiology contract was for the purpose of managing an unrulely Anesthesia department and not for antitrust purposes. Case law appears to support a general rule that exclusive medical-services contracts are acceptable when used as a management when used as a management technique and unacceptable when used as a pretext to eliminate competition or restrain trade.

For example, in Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir.1988), the exclusive contract violated antitrust laws because one of the purposes of the exclusive contract was to eliminate

Dr. Oltz as a competitor. Id. at 1449. In this case, rather than trying to eliminate Dr. Healow, defendants encouraged him to practice anesthesiology at Saint Vincent under the AP of Montana contract. All the anesthesia providers who worked at Saint Vincent prior to the exclusive contract and who applied to work under AP of Montana, were accepted by AP of Montana to work at Saint Vincent.

Other authorities recognize the general validity of exclusive arrangements which permit hospitals to control the medical staff. See, e.g., Morgan, Strand, Wheeler, & Biggs v. Radiology, LTD., 924 F.2d 1484 (9th Cir.1991), Konik v. Champlain Valley Physicians Hosp. Medical Center, 733 F.2d 1007, 1014-15 (2d Cir. cert.denied, 469 U.S. 884 (1984).

Dr. Healow's motions in limine

Pending before the Court are Dr. Healow' s motions in limine. to exclude certain evidence from trial. In light of the Court's ruling granting summary judgment In favor in the defendants, Dr. Healow's motions in limine are moot and therefore denied.

In accordance with the foregoing, **IT IS ORDERED**:

1. Plaintiff's motion for partial summary judgment is denied.

2. Anesthesia Partners, Inc.'s and Anesthesia Partners of Montana's motion for summary judgment is granted.

3. Saint Vincent Hospital and Health Center, Inc.'s motion for summary judgment is granted.

4. Plaintiff's motions in limine are denied.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and **DATED** this 23rd day of February, 1995

/s/
United States District Judge

15 USC Sec. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 USC Sec. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

30-14-205. Unlawful restraint of trade. It is unlawful for a person or group of persons, directly or indirectly:

(1) to enter an agreement for the purpose of fixing the price or regulating the production of an article of commerce;

(2) for the purpose of creating or carrying out any restriction in trade, to:

(a) limit productions;

(b) increase or reduce the price of merchandise or commodities;

(c) prevent competition in the distribution or sale of merchandise or commodities;

(d) fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled;

(e) agree to add to a bid for any contract an amount, fixed by percentage or otherwise, for the purpose of making a refund or sharing costs of bidding with any other bidder;

(f) return a part of any amount added to a bid by collusive agreement among bidders to any person;

(g) create a monopoly in the manufacture, sale, or transportation of an article of commerce;

(h) enter into an agreement which binds any person not to manufacture, sell, or transport an article of commerce below a common standard or figure or which keeps such article or transportation at a fixed or graduated figure or by which the price of such article is settled so as to preclude unrestricted competition.

EXCERPTS FROM PHYSICIAN WRITTEN COMMENTS TO AD HOC COMMITTEE

Snider: Presently, we have a fine staff of anesthesia people and I feel comfortable with all of the anesthesia staff. I can see absolutely no reason on a professional basis that anyone should be excluded from practicing anesthesia in St. Vincent Hospital. ... I strongly feel that the most appropriate solution to the majority of these problems will simply be free and spirited competition among these various individuals and groups to provide the best anesthesia care and coverage that we can get. ... The monopoly situation generally leads to an arrogant and nonresponsive staff.

Olson: [T]he consideration of an exclusive contract with a particular provider or group of providers to provide anesthesia services causes me alarm. Many of us have lived and practiced through very dark times with regard to the anesthesiology department and anesthesia coverage at St. Vincent Hospital, and the idea of a closed staff causes great concern. ... The idea of a closed anesthesiology staff or exclusive contract would set a dangerous precedent in this community. All non-hospital based practitioners operate in a free market

system and I do not feel that practitioners of anesthesiology should be any different.

Neuhoff: I think the threat of closure of that particular department, and especially the threat of that in a written memo, shows much short-sightedness on the part of St. Vincent Hospital. To close the staff would wreak havoc on surgery at St. Vincent Hospital as it is known now. Having one particular group of physicians controlling the department of anesthesia would surely breed complacency and lack of initiative to please the surgeons which are bringing the cases into St. Vincent's. I have no doubt in my mind that it would decrease the quality of care. ... I think there are some grave and far-reaching consequences should the staff be closed ... I think it's critical that instead of even considering that as an option, the Hospital needs to look at other remedies.

Lewallen: I don't think that this [nurse anesthesia question] can be solved by the hospital closing the anesthesia staff as I think that this would result in having fewer choices and less competition. I think that this would result in inefficient use of the operating room and returning anesthesia to where it was 8½-9 years ago. I do

not think that this would be a step forward for the hospital and I am opposed to it. ... I think it would be a mistake on the hospital's part to close the hospital staff.

Branson: I object to a monopoly of anesthesia services, ...

Johnson: I am very much opposed to a closed staff in any specialty for an number of reasons. I think that a closed staff creates a noncompetitive situation which, while it may have some advantages, I think it has more disadvantages, particularly in the area of the positive effect that competition has on quality, availability and cheerfulness in the provision of excellent medical care ... . Secondly, there are situations where patients request certain anesthesia services unless some arrangement were made to provide for that, a closed staff would eliminate the possibility of a patient receiving anesthesia from an anesthesiologist of their choice if he did not belong to a closed staff. Third, I am not in favor of a closed staff on general principles. Having a democratic, competitive environment where the people who provide the best service most willingly and in the most pleasant delivery of that service as well as highest

quality service, tend to thrive and others who don't measure up, tend not do so as well. I think that to have the best and the most excellent staff possible, a free and open staff is necessary.

Peet: [I] am concerned about the possibility of one group or the other obtaining a contract to the disadvantage of the other group. ... I think that something must be going right within the Department of Anesthesiology considering the high quality of anesthesiologists presently on the Staff at St. Vincent Hospital and Health Center.

Daniels: I am personally opposed to a closed or contractual M.D. staff. I think that the competitive nature of an open staff encourages better service and higher quality.

Brown: In summary, an open anesthesia staff, while perhaps not the easiest to administer, is nonetheless the framework that best assures the highest standards of care and service.

Randak: I would strongly encourage you not to undertake a contractual agreement with any group of anesthesiologists. ... I can't emphasize enough that I would be very unhappy to see any of these

individuals removed from the staff because of a contractual agreement with another group.

Hull: I would strongly discourage the closure of the department with an exclusive contract with a particular provider.

Klein: I also hope very much that your committee will not find it necessary to close a department or limit anesthesia personnel in any way.

Forseth: I have found the vast majority of the anesthesia personnel to be exceptionally competent, cooperative and dedicated to patient care. I would prefer to continue working with all groups in the same manner as we have been.